



Avoiding the Judge: the Exclusion of the δίκη in Contractual Clauses

José-Domingo Rodríguez Martín

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Avoiding the Judge: the Exclusion of the δίκη in Contractual Clauses*

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1. Textual Variations of the καθάπερ ἐκ δίκης Formula?

Since H. J. Wolff published in 1970 his inspired and ground-breaking study “Some observations on *praxis*”, the nature and functionality of the καθάπερ ἐκ δίκης formula in Roman Egypt has been under discussion. As is well known, the καθάπερ ἐκ δίκης formula is to be found in many legal papyri, usually (but not always)¹ inserted in one specific part of the contract, the so-called ‘πρᾶξις-clause’: the contract provision in which the parties agree how the creditor can enforce the contract in case the debtor does not fulfil his obligations.

Since Ptolemaic times, many types of formulas could be added to the πρᾶξις-clause, in order to define the specific methods and conditions that will rule that enforcement in particular. And so, when a καθάπερ ἐκ δίκης formula is inserted inside a πρᾶξις-clause, enforcement can be carried out καθάπερ ἐκ δίκης –what seems to mean: ‘(the execution will take place) as if a verdict was pronounced’. This legal fiction would therefore suppose that the creditor could act as if a judge had already rendered a judgment in his favor, and therefore he would be entitled to seize the properties (and the person) of the debtor without having to turn to the judge first. Καθάπερ ἐκ δίκης would actually mean, therefore, ‘without a verdict’.²

But for some scholars it is difficult to accept this interpretation for Roman Egypt, since Imperial constitutions of that period seem to limit –or even banish– such a prerogative, thus forcing the creditors to turn to the judge first, in case they claim to be entitled to enforcement.³ For this reason Wolff proposed an alternative interpretation of the formula, in order to avoid the above mentioned hermeneutic problems: καθάπερ ἐκ δίκης would not mean ‘without a verdict’, but: ‘in the same way as in a δίκη’. Wolff considered that the adverb καθάπερ would have a comparative meaning and not a hypothetic one (its semantic essence would be: ‘likewise’, not ‘as if’), so the expression would actually mean: ‘(execution will take place) following the rules of the δίκη’, or in other words, that enforcement should be carried out under judicial supervision, discarding any possibility of an out-of-court execution. The formula would therefore resort to an analogy, not to a legal fiction.⁴

* The research for this paper has been developed as part of the Research Project FFI2015-65511-C2-2-P, funded by the Spanish Ministerio de Economía y Competitividad.

¹ On testimonies of καθάπερ ἐκ δίκης formulas outside πρᾶξις clauses see Rodríguez Martín (2017).

² All translations in this paragraph by David / Van Groningen (1965) 44 n. 12. For an analysis of legal fictions in Greek legal inscriptions and papyri see Bertrand (2003) 407-408 and Jördens (2012) 400; on the origin and further development of legal fictions in Roman Law till Augustan times see Bianchi (1997); useful commentary on legal and jurisprudential examples of legal fictions in Thomas (1995) 169-186 and Ando (2011) 115-131; see also in general Ando (2015). On *quasi, ac si* and other legal terminology related to fictional clauses see Hackl (1982) and (1999); Rampazzo (2008) 411 n. 207 and Guzmán Brito (2016) 80-81.

³ See Kaser (1971) 330 n. 4, 5 and 6, with commented bibliography on the topic.

⁴ Wolff (1970) 535. On the contrast between analogy vs. fiction see Ando (2015) 310-312 and Guzmán Brito (2016) 83-85.

Clarifying this interesting question requires a wide-scope research, including the study of precedent and related legal testimonies, the collection of the numerous documentary testimonies of Roman time (more than five hundred), and their comparison with Greek, Ptolemaic and Roman Law. Although this research is already underway,⁵ it would be impossible to deal with it in the length limits established for this contribution; therefore this paper focuses on one of the many side problems of this question, namely the fact that documentary papyri and Greek inscriptions attest a number of other expressions whose wording is very similar to καθάπερ ἐκ δίκης: καθάπερ δίκην ὠφληκόντων, ὡς ἀπὸ / ἐκ / λογφ καταδίκης, καθάπερ καὶ τῶν ἄλλων τῶν δημοσίων δικῶν, ἐνεχυράζειν πρὸ δίκης and ἄνευ δίκης καὶ κρίσεως.

The first impression is that they all consist in just formal versions of the same material meaning, all of them alluding to some kind of fictional ‘exclusion of the δίκη’ to the benefit of one of the contract parties. Indeed, some scholars tend to identify these expressions as καθάπερ ἐκ δίκης textual versions without further check;⁶ others, on the contrary, simply ignore them when focusing their studies on the καθάπερ ἐκ δίκης formula, thus missing important testimonies.

Indeed, a careful study on the position and function of each of these expressions in the corresponding legal texts leads to the suspicion that not all of them match the features of the καθάπερ ἐκ δίκης formula. Therefore, it is necessary to establish accurate criteria in order to distinguish the specific expressions that constitute formal versions of the common καθάπερ ἐκ δίκης provision –and therefore the papyri that attest them have to be studied together with those containing the common formula– from those who despite their similar wording may have different meaning and purposes, and therefore should be discarded from the main research.

2. Case study

a. Καθάπερ δίκην ὠφληκόντων

This first formula is attested both in literary and epigraphical sources. We find it in the first place in a passage of Demosthenes’ speech against Lacritus. In paragraph D. 35.12 the orator describes a maritime loan, whose πρᾶξις-clause reads as follows:

(...) παρὰ Ἀρτέμωνος καὶ Ἀπολλοδώρου ἔστω ἡ πρᾶξις τοῖς δανείσασι καὶ ἐκ τῶν τούτων ἀπάντων, καὶ ἐγγείων καὶ ναυτικῶν, πανταχοῦ ὅπου ἂν ᾖσι, καθάπερ δίκην ὠφληκόντων καὶ ὑπερήμερων ὄντων, καὶ ἐνὶ ἑκατέρῳ τῶν δανεισάντων καὶ ἀμφοτέροις.⁷

«It shall be lawful for the lenders, whether severally or jointly, to collect the amount by proceeding against Artemo and Apollodorus, and against all their property whether on land or sea, wheresoever it may be, precisely as if judgement had been rendered against them and they had defaulted in payment».⁸

⁵ For some first critical considerations on the topic see already Rodríguez Martín (2013).

⁶ See below note 26 for some examples.

⁷ Greek text by Rennie (1921).

⁸ Translation by Murray (1939).

As can be seen, the *πρᾶξις*-clause allows the creditors Artemo and Apollodorus to act against the debtors *καθάπερ δίκην ὠφληκότων*, or wordily, «as if they had lost a trial», since *δίκην ὀφλεῖν* has a very specific procedural meaning.⁹

Interestingly, the belongings of the debtors are identified in the *πρᾶξις*-clause: *ἐκ τῶν τούτων ἀπάντων, καὶ ἐγγείων καὶ ναυτικῶν*, and exactly the same expression is found in P.Eleph. 1, the oldest *καθάπερ ἐκ δίκης* formula attested in the papyri (ll. 12-13):

ἡ δὲ πρᾶξις ἔστω καθάπερ ἐγ δίκης κατὰ νόμον τέλος ἐχούσης Δημητρία καὶ τοῖς μετὰ | Δημητρίας πράσσουσιν ἕκ τε αὐτοῦ Ἡρακλείδου καὶ τῶν Ἡρακλείδου πάντων καὶ ἐγγαίων καὶ ναυτικῶν.

«Let the execution be upon Herakleides himself and upon all the property of Herakleides, both on land and sea, for Demetria and those executing (together) with Demetria, as if (arising) from litigation legally completed».¹⁰

There are some features that link both testimonies, since not only the dates of the attestations are similar (ca. 310 BCE for P.Eleph. 1 - ca. 341 BCE for Demosthenes), but also both the *καθάπερ δίκην ὠφληκότων* and the *καθάπερ ἐκ δίκης* formulas are placed in the same exact point of the *πρᾶξις*-clause, therefore playing a similar role as qualifier of the type of execution. If we add that in both cases the identification of the goods («ground or maritime»)¹¹ submitted to execution is also the same, we can conclude that the epigraphic *καθάπερ δίκην ὠφληκότων* formula can be considered just a formal variation of the *καθάπερ ἐκ δίκης* one that we find in the papyri.¹²

This conclusion is reinforced by further epigraphical evidence: in the famous inscription IG 12.7.67B (the so-called “Praxikles-Loan”,¹³ concluded in Arkesine, Amorgos, 2nd cent. BCE) there are three *πρᾶξις*-clauses, one of them containing a *καθάπερ ἐκ δίκης* formula (ll. 46-48):

(...) ἐὰν δὲ μὴ ἀποδῶσιμ, πρακτοὶ ἔστωμ Πραξικλεῖ οἱ μὴ | ἀποδόντες ἡμιόλιον τὸ ἀργύριον ἐκ τῶν ἰδίων πράξει πάσῃ καθάπερ | ἐγ δίκης τέλος ἐχούσης κατὰ τὸ σύμβολον τὸ Ναξ[ί]ων κ[αὶ] Ἀρκεσινέων.

«In the event of non-payment, those who did not pay shall be liable to enforcement on behalf of Praxikles, for a pecuniary *hemionion* upon their properties, by means of any kind of execution as if judgement had been rendered against them, legally completed according to the agreement between Naxos and Arkesine».

The other two, on the contrary, include *καθάπερ δίκην ὠφληκότων*. See for example ll. 61-64 (the second testimony is to be found in lines 68-74):

καὶ ἐξέστω πράξασθαι Πραξικλεῖ ταῦτα τὰ χρήματ[α] πράξει πάσῃ ἔ[κ] τε τῶν κοινῶν τ[ῶ]ν Ἀρκ[ε]σινέων πάντων καὶ ἐκ τῶν | [ἰ]δίων τῶν Ἀρκεσινέων κ[αὶ] ἐ[κ] τῶν οἰκούντων ἐν Ἀρκεσίνῃ καὶ ἐξ ἐνὸς [ἐ]κάστου ἅπαν τὸ ἀργύριον κ[αὶ] ἐξ ἀπάντων, τρόπῳ ᾧ ἂν ἐπίσταιται, | καθάπερ δίκην ὠφληκότων ἐν τῇ ἐκκλήτῳ κατὰ τὸ σύμβολον τὸ Ναξ[ί]ων-κ[αὶ] Ἀρκεσινέων, τέλος ἔχουσιν ἀζημίῳ οὖντι πάσης ζημίας.

⁹ *Δίκην ὀφλεῖν* is a common expression in Greek legal epigraphy (*δίκη νικηθείς*), the meaning of which would be: «als ob er einen Prozeß verloren hätte», Jörs (1919) 13 n. 1. Similar examples by Demosthenes in D. 21.77 or D. 47.63. On details about the enforcement procedure in this speech see Goldschmidt (1889) 360-363.

¹⁰ Translation by Porten (1996).

¹¹ On the origin and evolution of the formula *ἐγγαίων καὶ ναυτικῶν*, see Rodríguez Martín (2018).

¹² The following scholars use indeed both expressions as synonyms: Mitteis (1891) 404-405; Dareste / Haussoullier / Reinach (1891) 333 n. 1; Brassloff (1900) 377 n. 2 and (1902) 9; Cantarella (1965) 21 n. 53; Wolff (1970) 533; Meyer-Laurin (1975) 197-198.

¹³ On this inscription see Migeotte (1984) 173-176; Wörle (1988) 206-207; Frölich (2005) 728-729, Velissaropoulos-Karakostas (2011) 165-167; Colorio (2014) 75-76.

«It shall be lawful for Praxikles to collect the debt by proceeding by means of any kind of execution against all communal goods of the Arkesines, and against the properties of all residents in Arcsine and against each one of them, by the total and upon everything, in the way he establishes, as if judgement had been rendered in court according to the agreement between Naxos and Arkesine, legally completed and free from any penalty».

As can be seen from these texts, all three *πρᾶξις*-clauses have the same structure and elements, since the three of them refer to the legal agreements ruling the enforcement and again all of them include the clarification that the δίκη has to be τέλος ἔχουσιν. Therefore, IG 12.7.67B becomes an essential testimony in this research, for it not only proves the identity between the *καθάπερ ἐκ δίκης* and the *καθάπερ δίκην ὠφληκόντων* formulas,¹⁴ but also links the precious testimonies of Demosthenes 35.12 and P.Eleph. 1.

A last testimony that supports the identity between both formulas is provided by another inscription of Arkesine, the so-called “Loan of Alexander” (IG 12.7.69, 3rd BCE).¹⁵ This document attests the *καθάπερ ἐκ δίκης* formula three times (ll. 15, 31, 40-41), always following the same pattern in the *πρᾶξις*-clause, but again in one of the three cases the clause includes a formal variation for the alternative formula: ὡς ὠφληκὼς δίκην.

b. Ὡς ἐκ / ἀπὸ / λογῶ καταδίκης

Once having verified in the last example that the formula can alternatively begin with either the adverb *καθάπερ* or ὡς,¹⁶ we can continue our analysis testing the equivalence between the second expression –ὡς ἐκ / ἀπὸ / λογῶ καταδίκης– and *καθάπερ ἐκ δίκης*.

First of all, it is necessary to check whether the substantives *καταδίκη* and *δίκη* can be considered synonyms in both formulas. From a mere semantic point of view, the term *καταδίκη* is very specific –always used within a legal semantic field–, while *δίκη*, on the contrary, is a highly polysemic word, the meaning of which covers not only legal concepts but also other semantic fields like for example that of Philosophy. Therefore, in order to evaluate the actual correspondence of meanings between these words when inserted in the corresponding formulas, we have to rely on the comparison of legal testimonies, which are again in this case epigraphical.

In the first place, there is usage evidence of the ὡς ἐκ καταδίκης formula in sepulchral inscriptions, such as in the Carian I Aph2007 12.1205 (ll. 10-11, 2nd BCE):

¹⁰(...) καὶ εἰσοίσει ἕκαστος αὐτῶν εἰς τὸν κυριακὸν φίσκον ἅ-| νὰ Χ μυρία, ὡς ἐκ καταδίκης

«and each one of them will contribute ten thousand to the Treasure respectively, as by judgement».

The clause is established to guarantee the payment of the fine against anyone who damages the tomb, apparently without the need to resort to the judge. And exactly the same type of clause is attested in another Carian sepulchral inscription from the same period (CIG 3.4300v), but this time using the common textual version *καθάπερ ἐκ δίκης* (ll. 11-12):

(...) τῆς προαγγελίας οὐσης παντὶ | τῷ βουλομένῳ ἐπὶ τῷ ἡμίσει *καθάπερ ἐκ δίκης*

«remaining (the possibility of a) legal action for the half, at disposal of anyone who wants to, as if judgement had been rendered».

It is clear that in both cases the different formulas are just alternative formal versions of the same legal instrument, directed to guarantee the payment of a fine.¹⁷

¹⁴ In this sense also Mitteis (1891) 401; Jörs (1919) 12-13; Cantarella (1965) 34 n. 99; Colorio (2014) 76.

¹⁵ On the similarities between this Amorgos inscriptions see Szanto (1888); Brassloff (1902) 3-4.

¹⁶ In this sense already Goldschmidt (1889) 370; Mitteis (1891) 418.

Another example of this textual version is to be found –with a little variation in the preposition, namely: ὥς ἀπὸ καταδίκης– in SEG 43.980 (ca. 1st BCE - 1st CE, Turant Assari, Myra, Asia Minor). In lines 5-8 a fine is established against anyone who buries a body in the grave without permission:

⁵(...) ἢ ὀφειλήσει ὁ θάψας τῇ Ἐλευθέρα κιθαρη-| φόρους ἑξακισχιλίας ὥς ἀπὸ καταδίκης τέλος ἔχού-| σης, τῆς πράξεως οὐσης παντὶ τῷ βουλομένῃ-| νῳ ἐπὶ τῷ τρίτῳ μέρει

«Otherwise, who buries will be bound to Eleucera by six thousand *cithareforoi* as by judgement legally completed, being (the possibility of) enforcement at disposal of anyone who wants to, up to the third part».

There are some revealing pieces of information in this testimony: first of all, the expression appears in a *πρᾶξις*-clause, again just like in the common *καθάπερ ἐκ δίκης* cases; on the other hand, again we find it coupled with the expression *τέλος ἔχουσης*, just like in the previous examples. There is thus no doubt that also in this case the double expression ὥς ἐκ / ἀπὸ καταδίκης should be considered a lexical variation of *καθάπερ ἐκ δίκης*.¹⁸

The expression *λογῷ καταδίκης*, on the contrary, is a different case. It is only attested in a few late documentary papyri (from 6th cent. CE on),¹⁹ and it never appears in a *πρᾶξις*-clause. One example is provided by P.Grenf. II 87 (602 CE), ll. 28-31:

(...) εἰ δὲ τοῦτο | ποιήσομεν παρέξομεν λόγῳ καταδίκης | ³⁰τοῦ νομίσματος ἑνὸς παρὰ κεράτια ἕξ κεράτια | ἕξ πρὸς τῇ ἀποδόσει τῆς αὐτῆς προχρείας

«but if we go into it (arrears), we will return by way of penalty six carats for every *nomisma* of what has been handed over as a pay in advance».

It seems that here *καταδίκη* has the meaning of ‘(contractual) penalty’ instead of ‘judgement’, and thus *λογῷ καταδίκης* must have a different meaning than *καθάπερ ἐκ δίκης*. The proof for this assumption is furnished by P.Stras. IV 194 (6th-7th cent. CE), a document that contains not only the *λογῷ καταδίκης* formula (l. 3) but also *καθάπερ ἐκ δίκης* (l. 11), which makes it an ideal tool to compare the different roles of each one of them:

(...) ταύτης | τῇ[ς] διαλύσεως κελεύει διδόναι τῷ ἐμμένοντι | μ[έ]ρει λόγῳ καταδίκης χρυσοῦ νομισμάτια | δώδεκα εὔσταθμα (...)

(...) ἐντεῦθεν ἤδη ὑπέθεντο ἀλλήλοις πάντα | ¹⁰αὐτοῖς τὰ ὑπάρχοντα καὶ ὑπάρξοντα | πράγματα καθ[ά]περ ἐκ δίκης.

«within this transaction, he orders that twelve gold *nomismata* of full weight must be paid to the present party by way of penalty (...) therefore in this moment let them subject reciprocally all their present and future properties as if judgement had been rendered».

This document attests that each formula is inserted in two totally different clauses of the contract, thus revealing their different nature and function: while *λογῷ καταδίκης* is referred to in contractual penalty clauses, *καθάπερ ἐκ δίκης* is as usual inserted in a goods submission clause. As a result, the expression *λογῷ καταδίκης* is no textual version of the *καθάπερ ἐκ δίκης* formula, and therefore it must be excluded from the list of testimonies.

¹⁷ In this sense also Mitteis (1891) 410-411; Cantarella (1965) 35 n. 99; Wörrle (1988) 207 n. 131. Another testimony is provided by SEG 15.685. ll. 25-28, 1st-2nd cent. CE.

¹⁸ Support this identification Fröhlich (2005) 728 and Schweyer (2002) 77-78, 87-88. Another testimony of ὥς ἀπὸ καταδίκης in SEG 38.1462, 183-185, on which see Wörrle (1988) 205-206.

¹⁹ In fact Berger (1911) 10 considered it a *ἄπαξ εἰρημένον*. Testimonies: P.Stras. IV 194 (6th-7th cent. CE), P.Lond. V 1730 (585 CE), P.Muench. I 12 (590-591 CE), P.Muench. I 13 (594 CE) and P.Grenf. II 87 (602 CE).

c. Ἐνεχυράζειν πρὸ δίκης

A very different case is that of the expression: ἐνεχυράζειν πρὸ δίκης, which is only attested in one document, the Attic inscription IG 2.2.1241 (ca. 300 BC), l. 37:

(...) ἐὰν δὲ μὴ ἀποδιδῶι τὴν μίσθωσιν ἐ-[ν] τοῖς χρόνοις τοῖς γεγραμμένοις ἢ μὴ |
³⁵[ἐ]ργάζεται τὸ χωρίον κατὰ τὰ γεγραμμέ-| [ν]α, ἐξεῖναι τοῖς φρατριάρχοις καὶ Δυα-|[λεῦ]σιν
 ἐνεχυράζειν πρὸ δίκης καὶ μισ-| θῶσαι ἐτέρωι τὸ χωρίον ὧι ἂν βούλωντα-|[ι] (...)

«If (the other contracting party) fails to pay the rent within the prescribed time limit or (the other contracting party) does not work the soil as prescribed, it shall be lawful both for the *fratria* presidents and for the Dyaleians to take the land to pledge πρὸ δίκης and to rent it to anyone they wish to».

From the text we understand that the community of Dyaleia has rented some pieces of land, and that the payment of the rent is guaranteed for the community and other creditors by means of ἐνεχυράζειν, a pledge that has to be taken πρὸ δίκης, being them free afterwards to rent the land to a different person. If the identity between this expression and the καθάπερ ἐκ δίκης formula were verified, IG 2.2.1241 would constitute the oldest testimony of a καθάπερ ἐκ δίκης formula.²⁰

But ἐνεχυρασία is a very specific and well-known legal instrument, attested not only through inscriptions but also in Ptolemaic papyri: as is well known, it refers to the seizure of the debtor's goods by the creditor, at the beginning of the general enforcement procedure; the goods had to be registered upon the authorities (καταγραφή), being afterwards sold at auction (προσβολή). The purchaser would obtain definitive possession of the goods by ἐμβάδεια.²¹

On the other hand, none of the many meanings of the preposition πρὸ is an equivalent to καθάπερ ἐκ, which has a clear meaning of 'as if' (or maybe also 'instead of'), as shown above; πρὸ could be here translated rather as 'before', a much better match to what we know about the ἐνεχυρασία legal practice: a pledge carried out at the very beginning of the enforcement procedure.

It is also true, nevertheless, that the position of the ἐνεχυράζειν πρὸ δίκης formula in the text is very similar to the place usually assigned to καθάπερ ἐκ δίκης. But in this case, the whole interpretation of the formula as 'as if by virtue of a legal sentence (i.e. also without a court decision)'²² should be subverted, based on one isolated testimony. However it may be, the appropriate assessment of this third formula depends on a previous clarification not only of the legal nature and function of the καθάπερ ἐκ δίκης formula itself, but also of the very concept of 'Exekutivurkunden' (immediately enforceable documents) in the ancient world;²³ but that aim logically requires a deeper, thorough new legal study, that would go beyond the length limitations established for this paper. Therefore the testimony of IG 2.2.1241 must be taken into account but left in quarantine for the moment.

²⁰ In this sense –but nevertheless with doubts– Mitteis (1891) 405-407; Dareste / Haussoullier / Reinach (1891) 334 n. 6; Brassloff (1902) 4-8; Grundz.Mitt. 121.

²¹ On ἐνεχυρασία recently Colorio (2013) and (2014). On the enforcement procedure see Jörs (1919) 47-75; Taubenschlag (1955) 524-537; Seidl (1962) 99-104 and (1973) 125-127; Rupprecht, Einf. 149-150; Llewelyn (1994) 204-212; Kelly (2011) 108-111. On an etymological analysis of ἐνεχυρασία and its relationship with the concept of πρᾶξις see Bravo (1980) 693-704.

²² So Pestman, Prim.² 69.

²³ On this see recently Alonso (2016) 62, who opportunely points out that the executive force of the document would depend maybe more on its notarization than on the presence of a πρᾶξις-clause.

d. Καθάπερ καὶ τῶν ἄλλων τῶν δημοσίων δικῶν

Our fourth example presents again a very similar formal structure to the *καθάπερ ἐκ δίκης* formula, but nevertheless it is necessary to submit its validity to a test, just like in the previous cases.

Again in this case there is only one testimony of the formula: an inscription of Teos (Ionia), SIG 2.578, from the 2nd cent. BCE (ll. 59-60):

(...) τὰς δὲ πράξεις τῶν δικῶν τού-| ⁶⁰των ἐπιτελείτωσαν οἱ εὐθυνοὶ καθάπερ καὶ τῶν ἄλλων τῶν δημοσίων δικῶν

«Enforcements of these procedures? / judgements? will be in charge of the *euthynoi*²⁴ like in other public procedures? / judgements?»

The inscription regulates a school foundation and provides for penalties in order to guarantee the survival of the institution. Being the foundation a private institution, it seems though that the *πρᾶξις*-clause is granting the foundation the same enforcement privileges as the State (hence the adjective *δημόσιος*): in other words, a direct enforcement with exclusion of the *δίκη* (the meaning of which, in this case, is difficult to specify, for it may refer either to the whole judicial procedure or *stricto sensu* to the final judicial decision), «like in other public procedures / judgements».

One final piece of information supports this interpretation: the fact that the claim is also here open to «anyone who wants to» (*δικασάσθω δὲ αὐτῷ ὁ βουλόμενος*), directly links this document to another *καθάπερ ἐκ δίκης* testimony, the above commented sepulchral inscription CIG 3.4300v, among others.²⁵ This testimony may be therefore considered as an isolated textual version of the *καθάπερ ἐκ δίκης* formula.

e. Ἄνευ δίκης καὶ κρίσεως

The fifth and last example –occasionally mentioned by scholars as a variation of the *καθάπερ ἐκ δίκης* formula–²⁶ is widely attested in the papyrological documentation: just a quick search in the data bases provides at least 66 examples, that range from 119 BC (P.Tebt. I 11) to the 8th cent. CE (P.Rain.Unterricht I 12).

Throughout these centuries the formula presents formal variations, like for example: ἄνευ κρίσεως καὶ δίκης (P.Adler G4. I.11, 109 BCE,) or ἄνευ κρίσεως (BGU IV 1146. I. 16, 19 BCE). On the other hand, it shows up in the texts often accompanied by other sub-clauses, of which the most attested examples are: ἄνευ (πάσης) ἀντιλογίας (see for example P.Oxy. XVI 1891. I. 14, 495 CE), ἄνευ (πάσης) εὐρησιλογίας (P.Stud.Pal. XX 45. I. 9, 237 CE) and ἄνευ (πάσης/τίνος) ὑπερθέσεως (CPR I 29. I. 17, 184 CE), a formula only attested in Roman documents.²⁷

But the most relevant feature of this expression is the fact that it often shares the document with the *καθάπερ ἐκ δίκης* formula: almost the half of the examples of ἄνευ δίκης καὶ κρίσεως include both formulas. At first sight, it would seem a similar situation to the above

²⁴ On the legal role of the *euthynoi* see Fröhlich (2004) 109-112.

²⁵ For further parallel testimonies (IG 12.4/1.132) see Thür (2011) 349 n. 20.

²⁶ See for ex. Seidl (1962) 102-103; Cantarella (1965) 34 n. 99: «... che pare avesse la stessa funzione».

²⁷ There are other accompanying sub-formulas, but they are rarely attested, like for example: (ἄνευ) πάσης κακοτεχνίας (P.Dion. 25. I. 22, 104 CE,), only used by the end of second BCE; in Byzantine times there are also testimonies of (δίχα) πάσης ἀμφιβολίας (e.g. P.Cair.Masp. III 67305. I. 21, 568 CE), (χωρὶς) ἀφορμῆς (SB XVI 12488. I. 16, 538 CE), (δίχα) παραγραφῆς νόμων (P.Cair.Masp. II 67162. II. 26-27, 568 CE) or (δίχα) τῆς τυχούσης παρολκῆς (P.Oxy. LXIII 4394. I. 121, 494-500 CE).

mentioned IG 12.7.67B, in which the cohabitation of both the καθάπερ ἐκ δίκης and the καθάπερ δίκην ὠφληκόντων formulas was attested.

But in this case, the situation is different, since in the “Praxikles’ Loan” the πρᾶξις-clauses employed both expressions as equivalent to each other. The formulae were treated as synonymous. Here, on the contrary, ἄνευ δίκης καὶ κρίσεως never appears in the πρᾶξις, but among the penalty clauses. In other words: while the ἄνευ δίκης καὶ κρίσεως formula establishes a way to compel the debtor to fulfil his obligations, καθάπερ ἐκ δίκης describes the type of enforcement once the debtor has refused to comply. In fact, other features of the ἄνευ κρίσεως καὶ δίκης formula point not only to a different function in the contract, but even to an Egyptian origin, which gets this formula away of the Greek-Roman tradition of the καθάπερ ἐκ δίκης formula.²⁸ So even though the wording of both formulas refer to some kind of ‘exclusion of the δίκη’ in order to provide an advantage for the creditor,²⁹ each one of them has a different functionality and plays a different legal role in the contract. Therefore, this fifth expression must be also left aside when dealing with textual variations of the common καθάπερ ἐκ δίκης formula.

3. Conclusions

As a result of this research, it can be attested that the three expressions: καθάπερ δίκην ὠφληκόντων (or ὡς ὠφληκὼς δίκην), ὡς ἀπὸ / ἐκ καταδίκης and καθάπερ καὶ τῶν ἄλλων τῶν δημοσίων δικῶν are just formal variations of the καθάπερ ἐκ δίκης formula, for they all seem to rest on the same legal fiction: the virtual existence of a previous δίκη, which allows the creditor to immediately enforce the non-fulfilled obligations of the contract without having to resort to the judge. Therefore the three of them must be also taken into consideration in any research dealing with the meaning of function of the καθάπερ ἐκ δίκης formula. Both the expressions λογὼ καταδίκης and ἄνευ δίκης καὶ κρίσεως, on the contrary, are never to be found in enforcement clauses, since they always refer to contractual penalties; having therefore no semantical nor functional relationship with any fictional exclusion of the δίκη, they cannot be considered formal variations of the καθάπερ ἐκ δίκης formula. Finally, the expression ἐνεχυράζειν πρὸ δίκης (only attested once) raises so many exegetical doubts, that it is difficult to attest its concordance with the expression καθάπερ ἐκ δίκης. Would it be the case, it would constitute the oldest testimony of a καθάπερ ἐκ δίκης formula.

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²⁸ On the parallelism of this formula and the demotic formulas attested in P.Ryl. I 10 = P.Eheverträge 10, see Sethe / Patsch (1920), 544; Seidl (1962) 102; Wolff / Rupprecht (2002) 94. On the similarities of this formula with the Latin Roman provisions *sine controuersia et spe futurae dilationis* (ChLa. 42 1207, 153 CE) and *sine ulla controuersia* (C.Epist.Lat. 13, 27 CE), see Wolff / Rupprecht (2002) 95 n. 116.

²⁹ On the technical distinction between δικάζειν and κρίνειν see Wolff (1962) 98-100.

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